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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

JOSEPH PAUL JERNIGAN,
PETITIONER

-V-

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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By: M. P. Duncan III

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 1983, a true and correct copy of the Petition for Writ of Certiorari to the Texas Court of Criminal Appeals, was placed in the United States Mail, first class postage prepaid, addressed to Mr. Patrick C. Batchelor, District Attorney, Navarro County Courthouse, Corsicana, Texas 75110, and to Jim Mattox, Attorney General for the State of Texas, State Capitol, Austin, Texas 78711. I further certify that all parties required to be served have been served.

SIGNED this 19th day of September, 1983.

Original Signed By
M. P. DUNCAN III

M. P. DUNCAN III

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, JOSEPH PAUL JERNIGAN, moves the Court for an order permitting him to prosecute a Petition for Writ of Certiorari to review a Judgment of the Texas Court of Criminal Appeals, entered April 27, 1983, in forma pauperis, pursuant to 28 U.S.C. §1915, and in support of this Motion attaches hereto the Affidavit of the Petitioner.

Respectfully submitted,

Original Signed By
M.P. DUNCAN III

M. P. Duncan III
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, JOSEPH PAUL JERNIGAN, being first duly sworn, depose and state that I am the Petitioner in the above styled cause; that in support of my Motion to Proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to the relief I seek; and that the issue which I desire to have heard in this proceeding is as follows: Whether the Texas Court of Criminal Appeals erred in affirming my conviction of capital murder when two (2) prospective jurors were excused by the trial court in violation of the constitutional standards enunciated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and Adams v. Texas, 488 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for Writ of Certiorari are true:

1. Are you presently employed?

   "No"

2. Have you received within the past twelve (12) months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other sources?

   "No"

3. Do you own any cash or checking or savings accounts?

   "No"

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   "No"

5. List the persons that are dependent upon you for support and state your relationship to those persons.

   "None"

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Joseph P. Jernigan
JOSEPH PAUL JERNIGAN

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this 14 day of September, 1983.

Notary Public, State of Texas
COMCP 10-25-86

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE CRIMINAL APPEALS OF TEXAS

The Petitioner, JOSEPH PAUL JERNIGAN, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Texas Court of Criminal Appeals, entered in this proceeding on April 27, 1983.

I.

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

The Opinion of the Texas Court of Criminal Appeals is unreported; however, a copy of such Opinion is attached hereto as Appendix A.

II.

JURISDICTION

The Order of the Texas Court of Criminal Appeals was entered April 27, 1983. This Petition for Writ of Certiorari was filed pursuant to an Order of this Court dated August 8, 1983, extending the time for filing this Petition for Writ of Certiorari until September 20, 1983.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The Petitioner asserted in the Texas Court of Criminal Appeals and asserts here a deprivation of rights secured by the Constitution of the United States.

III.

QUESTION PRESENTED

Whether the Texas Court of Criminal Appeals correctly applied the constitutional standards of juror exclusion in capital murder cases as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 488 U.S. 38 (1980), when it reviewed the rulings of the trial court and its exclusion of the two (2) prospective jurors.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. In addition, this case involves the following Texas statutes:

§19.03(a)(2) TEX. PENAL CODE:

"[T]he person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson."

§12.31(a) TEX. PENAL CODE:

"An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death."

V.

STATEMENT OF THE CASE

The Petitioner, Joseph Paul Jernigan, was indicted for the July 3, 1981, murder of Edward Hale, alleged to have occurred during the course of committing a burglary and robbery.

The Petitioner was tried in the 13th Judicial District Court of Navarro County, Texas. Jury selection began on October 26, 1981, and concluded on October 29, 1981. The Petitioner's trial proceeded, and he was found guilty and sentenced to death on November 4, 1981.

In his appeal to the Texas Court of Criminal Appeals the Petitioner asserted that the following venire persons were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980):

a. Sheila Wafer, and

b. Billy Anderson.

The Petitioner's contentions on appeal were rejected by the Texas Court of Criminal Appeals [see Appendix A] and the question presently being presented arises from that review of his conviction.

INDIVIDUAL VOIR DIRE EXAMINATION OF VENIRE PERSON SHEILA WAFER

Mrs. Sheila Wafer was excused as a juror by the trial court over the Petitioner's contemporaneous objection pursuant to the prosecution's challenge for cause that she was irrevocably opposed to the death penalty.

Although a complete transcript of Mrs. Wafer's examination is annexed hereto as Appendix B, the excerpts relevant to the question being presented are hereinafter noted.

For example, the State's initial inquiry concerning the essence of Mrs. Wafer's somewhat waivering objections to the death penalty was answered conversely to the position taken in its challenge for cause.

Q [By the District Attorney] Then, at this time, your opinion against the death penalty is set and fixed firm, is it not?

A No, not for, you know--I don't know. I'm so nervous, I ain't never did this before. But anyway, you

know, if I think -- if I heard something, you know, like if I was on serving as a juror or something like that, and I felt that this person done something wrong, you know, if it was real bad, then, I think I had to after thinking about it and --. B/179[1]

Following the State's interruption of her response, Mrs. Wafer's answers to the State's question appear to support its challenge for cause. At least and until the following exchange:

Q Are your feelings against the death penalty so strong that you would feel compelled to answer one or more of the questions no so that the defendant could not get the death sentence, but would get the life imprisonment sentence?

A I would, you know, if my feelings would probably be life sentence.

Q Okay. And you would feel like that you would have to answer one of those questions no so he would get the life sentence instead of the death penalty?

A Yes. B/184-185

An equitable reading of this dialogue suggests that Mrs. Waver would vote "no" to one of the issues only if she thought a life sentence was appropriate. However, following further suggestive questioning, Mrs. Wafer did state she would vote against the death penalty "regardless of the facts and circumstances that might emerge in the course of the proceedings." B/185

The Petitioner's examination of Mrs. Wafer, however, casts her opinion about the death penalty in a different light.

Q [By Defense Counsel] Now, this or any other case, after all the evidence is in, the Court gives what is called

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1. All references to testimony will be noted initially to the proper Appendix, then the page of the Appendix.

a charge to the jury. It's in writing. He tells them what the law is in this particular case, and that you happen to be on a jury, and maybe a burglary case, maybe a murder case. Maybe a theft case, but he tells the jury what the law is on that particular case, the one being tried.

Is there any reason why you couldn't follow the law as the court tells you it is?

A No.

Q If you were a juror in this particular case, he would tell you what constitutes murder. Could you and would you follow the court's charge as to what murder is?

A Well, I could.

Q The Court may tell you in this or any other case what evidence you can consider and that evidence you cannot consider. Will you follow what His Honor tells you if you are on this jury or any other jury in this matter?

A I don't really understand what you are talking about.

Q Well, the Court may tell you that, for example, that you shall not consider, and he's already told you that you shall not consider the indictment as any evidence at all. He may tell you that other things should not be considered. Is there any reason why you couldn't follow the Court's charge in that respect?

A No.

Q If you sat on this or any other capital murder case, and you and the other jurors found the defendant guilty, then a capital murder case, you would have to answer those first two questions up there for sure. Is there any reason why you couldn't answer those questions based upon the evidence as you have heard it?

A No, not from listening to the evidence, I couldn't but -- B/188-190

Upon the State's redirect examination Mrs. Wafer's response to the questioning about her role in the process of imposing a death penalty is hardly indicative of one who is adamantly opposed to the sentence of death: "I don't think I can, no." B/191

INDIVIDUAL VOIR DIRE EXAMINATION
OF VENIRE PERSON BILLY ANDERSON

Mr. Billy Anderson was also excused as a juror by the trial court on the same basis and over the same objection as was Mrs. Wafer. However, the absence of any absolute opposition to the death penalty is more apparent in Mr. Anderson's response than Mrs. Wafer's.

A complete transcription of Mr. Anderson's voir dire examination is annexed hereto as Appendix C. However, for brevity and clarity, specific passages, applicable to the issue being presented to the Court, will be duplicated when essential.

The prevading characteristic of the entire voir dire examination of Mr. Anderson is the pragmatic time limitation apparent in his responses. For example, after explaining the nature of the prosecution (capital murder) and inquiring as to the venire person's feelings about the death penalty, the prosecutor asked and Mr. Anderson answered:

Q [By the District Attorney] Even if you were sworn as a juror to return a true verdict upon the evidence, are you telling us and the Court that you could never recommend a sentence of death, regardless of the evidence?

A Well, <u>right now</u> [emphasis added], yeah. I would have to say that I couldn't recommend a death sentence. C/436

In addition, after noting some hesitation in some preceding questions the State's attorney inquired further.